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IN THE COURT OF APPEALS OF INDIANA

BERRY A. SAUER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-0710-CR-874
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0612-FA-287

May 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Berry Sauer appeals his conviction and sentence for Class A felony dealing in methamphetamine and Class C felony maintaining an illegal drug lab and for being an habitual substance offender. We affirm.

Issues

Sauer raises four issues, which we reorder and restate as:

I. whether there is sufficient evidence to support his convictions;

II. whether his maintaining an illegal drug lab is a lesser included offense of dealing in methamphetamine;

III. whether the trial court's failure to sentence Sauer within thirty days of the jury's verdict requires his discharge; and

IV. whether his fifty-five-year sentence is appropriate.

Facts

On December 12, 2006, Indiana State Police officers and Huntington Police officers executed a search warrant for a home located at 529 Poplar Street in Huntington. Sauer and his girlfriend, Rebecca Garab, rented the home. Garab had recently moved out of the house, and Sauer was not home at the time the search warrant was executed. Sauer's half-sister, Buffy Schoff, and her boyfriend, Terry Cooley, who was friends with Sauer, and a two-year-old child were at the house at the time of the search.

During the search of the house, the police recovered 5.35 grams of methamphetamine, a spoon with a white residue, baggies, syringes, and ephedrine. In the crawl space of the house, police discovered nine empty twenty-pound propane tanks. A

search of the garage revealed several modified fire extinguishers containing anhydrous ammonia, two gallons of camping fuel, starting fluid, muratic acid, a blender containing a white residue, ephedrine, and a lithium battery. A window in the garage had been modified to house an exhaust fan. Two cameras were affixed to the exterior of the garage and were connected to a monitor located inside the garage.

Outside of the garage police found a burn barrel containing an unspent lithium battery, several empty pseudoephedrine blister packs, various pseudoephedrine and ephedrine boxes, and burnt strippings and casings of lithium batteries. Police also found a gallon trashcan containing dissolved pills, described as "[a] rather large soak[.]" Tr. p. at 285. Also on the property was a car that did not run. The trunk of the car contained a "box lab" including baggies, a hot plate, a box of rubber gloves, a wooden spoon, funnels, a spice grinder, two quart bottles of Liquid Fire, a bag containing a reddish powdery substance, salt, plastic tubing, camping fuel, a glass container, and bags containing clear liquid. Id. at 275.

The next day, the State charged Sauer with Class A felony possession of methamphetamine, Class A felony dealing in methamphetamine, and Class C felony maintaining an illegal drug lab. On May 14, 2007, the State alleged that Sauer was an habitual substance offender. On June 8, 2007, a jury found Sauer guilty as charged, and the trial court set the sentencing hearing for July 17, 2007. At the sentencing hearing, the trial court merged the possession conviction into the dealing conviction. The trial court sentenced Sauer to fifty years on the dealing conviction and eight years on the illegal drug lab conviction. The trial court ordered these sentences to be served concurrently

and enhanced this sentence by five years for the habitual substance offender finding, for a total sentence of fifty-five years. Sauer now appeals.

Analysis

I. Sufficiency of the Evidence

Sauer argues that there is insufficient evidence to support his dealing in methamphetamine and illegal drug lab convictions.[1] Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the fact finder's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We may consider only the probative evidence and reasonable inferences supporting the verdict. Id. We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Addressing all three charges together, Sauer argues there is insufficient evidence to support his convictions because he wasn't home when the search warrant was executed, he didn't own the car in which the drug lab was found, and "there were too many people other than [Sauer] who had access to 529 Poplar Street." Appellant's Br. p. 13. In making his argument, Sauer points to Cooley's testimony that Cooley manufactured methamphetamine on the night of December 11, 2007, that the

[1] Sauer also claims there is insufficient evidence to support his possession of methamphetamine. However, because this conviction merged into the dealing in methamphetamine conviction, we need not address this argument.

methamphetamine found in the house belonged to Cooley, and that Cooley brought the items necessary to make the methamphetamine to Sauer's house. We decline Sauer's request to reweigh the evidence.

Beginning with the Class A felony dealing in methamphetamine charge, based on the charging information, the State was required to prove that Sauer knowingly or intentionally manufactured methamphetamine within 1000 feet of school property. See Ind. Code § 35-48-4-1.1. Considering the evidence most favorable to the verdict, State Trooper Jason Faulstich testified that, although Sauer told him that he did not "cook" the methamphetamine at home, Sauer admitted that he would "drop the dope" at home. Tr. pp. 433-34. Trooper Faulstich stated:

> dropping the dope is a term that they use for the final step. In the final step they have a solvent that they have basically put the meth in to after the cooking process. It's a methamphetamine base.
>
> In order to get that out they have to take, usually some type of sulfuric or Muriatic acid, add it to a salt, also commonly known as a HCL generator. They will combine those two (2) items, have a house and they will run that through in to the solvent liquid, bubble it out, as it bubbles ... and that causes the dope to drop out or to crash out the bottom. Then they will pour it through a filter and then they will have the meth.

Id. at 434-35. Consistent with Trooper Faulstich's testimony, Garab testified that in November and December of 2006, she purchased large quantities of pills and Sauer used the pills to manufacture methamphetamine in the garage.

In addition to this manufacturing evidence, Huntington Police Detective Chad Hacker testified that the Huntington Catholic School was approximately 440 feet from

529 Poplar Street. The evidence is sufficient to establish that Sauer knowingly or intentionally manufactured methamphetamine within 1000 feet of a school.

As for the Class C felony illegal drug lab charge, the State was required to prove that Sauer possessed anhydrous ammonia within 1000 feet of school property with the intent to manufacture methamphetamine. See I.C. § 35-48-4-14.5. Sauer contends that the State failed to provide sufficient evidence that he constructively possessed the anhydrous ammonia found in the garage.

A defendant is in the constructive possession of contraband when the State shows that the defendant has both (i) the intent to maintain dominion and control over the contraband and (ii) the capability to maintain dominion and control over the contraband. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). Proof of a possessory interest in the premises where the contraband is found is adequate to show the capability to maintain dominion and control over the items in question. Id. "In essence the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises. And this is so whether possession of the premises is exclusive or not." Id. at 340-41 (citation omitted).

Here, the owners of the house testified at trial that they had agreed to rent the house to Sauer beginning in November 2006. Further, the undisputed evidence shows that Sauer resided at the house. Thus, there is sufficient evidence to show that Sauer had the capability to maintain dominion and control over the anhydrous ammonia found in the garage.

As for the intent prong of constructive possession, when a defendant's possession of the premises on which contraband is found is not exclusive, then the inference of intent to maintain dominion and control over the contraband must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the contraband and its presence. Id. at 341. The additional circumstances have been shown by evidence of:

> (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Id.

Here, there is overwhelming evidence that Sauer intended to possess the anhydrous ammonia. First, he made incriminating statements to Trooper Faulstich regarding methamphetamine manufacturing and the possession of anhydrous ammonia. Sauer also told Trooper Faulstich that Cooley and Schoff had stolen some fire extinguishers from a local motel and had brought them to Sauer's house. Sauer also told Trooper Faulstich that an altered fire extinguisher was "sparging off," or leaking anhydrous ammonia, inside the house. Tr. p. 427.

In addition to those incriminating statements, on the day of the execution of the search warrant Sauer called Schoff and bragged that he had obtained large quantities of pseudoephedrine. However, at some point during that day, Sauer found out about the raid and accused Schoff of setting him up. Later that day, Detective Hacker contacted Sauer on his cell phone and asked to speak with Sauer. Sauer told Detective Hacker, "at

this time he wasn't ready to speak about it and that he would contact [Detective Hacker] or the Police Department when he was ready." Tr. p. 383. Detective Hacker testified, "He said he knew he was in a lot of trouble." Id.

Further, the tanks of anhydrous ammonia were found in the garage along with many other components required for the manufacturing of methamphetamine. The garage had been retrofitted with a ventilation system, which was not in place at the time Sauer took possession of the premises, and a video monitoring system had been installed in the garage. These facts taken with the evidence in the burn barrel and the trunk of the car and the pills soaking in the bucket outside of the garage confirm a methamphetamine manufacturing setting.

Sauer's admitted involvement in the manufacturing of methamphetamine and the extensive evidence of methamphetamine manufacturing at Sauer's home support the inference of Sauer's intent to constructively possess anhydrous ammonia. Because the State established that Sauer intended to maintain dominion and control over the anhydrous ammonia and that he had the capability to maintain control over the ammonia, the State established that he constructively possessed the ammonia. There is sufficient evidence to support the illegal drug lab conviction.

II. Lesser Included Offense

Sauer also asserts that the illegal drug lab conviction is a lesser included offense of the dealing conviction. He claims that he "would not have been in the process of manufacturing methamphetamine without possessing anhydrous ammonia or ammonia solution." Appellant's Br. p. 17.

Generally, "A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser." Bush v. State, 772 N.E.2d 1020, 1023-24 (Ind. Ct. App. 2002), trans. denied. To establish that Sauer committed Class A felony dealing in methamphetamine, the State was required to prove that Sauer knowingly or intentionally manufactured methamphetamine within 1000 feet of school property. See Ind. Code § 35-48-4-1.1. To establish the Class C felony illegal drug lab charge, the State was required to prove that Sauer possessed anhydrous ammonia within 1000 feet of school property with the intent to manufacture methamphetamine. See I.C. § 35-48-4-14.5.

In addressing a similar situation involving dealing and possession of precursors convictions, we observed:

> The sole practical difference between these two offenses is that one may be guilty of possessing chemical precursors with intent to manufacture without actually beginning the manufacturing process, whereas the manufacturing process must, at the very least, have been started by a defendant in order to be found guilty of manufacturing methamphetamine.

Bush, 772 N.E.2d at 1024.

A careful examination of the facts and circumstances of each particular case is necessary to determine whether the possession charge is a lesser included offense of the dealing charge. Id. "If the evidence indicates that one crime is independent of another crime, it is not an included offense." Id.

In Bush, we concluded that where the defendant's manufacturing conviction was based exclusively on his possession of precursors, the same evidence was used to

establish that Bush manufactured methamphetamine and that he possessed precursors. Id. The crimes were not independent of one another. Id.

The same day we decided Bush, however, we also decided Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002), trans. denied. The facts in Iddings were different than those in Bush. In Iddings:

> chemical analysis revealed that police recovered completed methamphetamine at Iddings' residence. Additionally, police recovered chemical precursors of methamphetamine, including pseudoephedrine and lithium metal, in large quantities and in proximity to other items associated with methamphetamine manufacturing, including soda pop bottles that apparently had been converted into hydrogen chloride gas generators. Thus, there was evidence in this case that Iddings (1) had already manufactured methamphetamine and (2) possessed the chemical precursors of methamphetamine with the intent to manufacture more of the drug.

Iddings, 772 N.E.2d at 1017. Based on this evidence, we concluded that Iddings' possession of precursors was not necessarily a lesser included offense of manufacturing methamphetamine because "two independent offenses were committed for which Iddings could be separately punished." Id.

The facts of this case are similar to those in Iddings. Here, it is abundantly clear that Sauer had previously manufactured methamphetamine. In addition to the methamphetamine found in the house and the extensive evidence of an ongoing methamphetamine manufacturing operation, Sauer admitted that he had manufactured methamphetamine. It is also clear that Sauer intended to make more methamphetamine. Pills were soaking in a trashcan in the yard, and Sauer was not at home at the time of

execution of the search warrant because he was in Gary where he could "get around the whole log system" and "obtain a couple cases of Pseudoephedrine." Tr. p. 433.

Thus, the fact that Sauer had manufactured methamphetamine is a separate offense from his possession of anhydrous ammonia with the intent to manufacture more methamphetamine. Under these facts, the illegal drug lab conviction is not a lesser included offense of the dealing in methamphetamine conviction.

III. Sentencing Hearing

Sauer argues that because the jury returned its verdict on June 8, 2007, and he was not sentenced until July 17, 2007, he should be discharged. We disagree.

Indiana Criminal Rule 11 provides in part, "the court shall sentence a defendant convicted in a criminal case within thirty (30) days of the plea or the finding or verdict of guilty, unless an extension for good cause is shown." At the conclusion of the June 8, 2007 jury trial, the trial court scheduled the sentencing hearing for July 17, 2007. Sauer did not object. A timely objection should be made to any improprieties that occur during the course of a trial so that the trial court may be informed of them and take effective action to remedy the alleged error. Burnett v. State, 815 N.E.2d 201, 207 (Ind. Ct. App. 2004). "Objections not timely raised to the trial court are waived on appeal." Id. Sauer's failure to make a timely objection waives this issue.

Waiver notwithstanding, Sauer makes no claim that his substantial rights were prejudiced by this nine-day delay. See Ind. Appellate Rule 66(A) ("No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in

light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties."); Ind. Trial Rule 61. In the absence of any such showing, Sauer has not established that discharge is required.

IV. Appropriateness of Sauer's Sentence

Sauer also claims that his fifty-five-year sentence is inappropriate in light of the nature of the offense and the character of the offender. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. Sauer has not met this burden.

In considering the nature of the offense, we acknowledge that Sauer was participating in an ongoing, extensive methamphetamine manufacturing operation involving at least three other people. Additionally, this dangerous enterprise took place in the presence of Garab's and Schoff's children.

Regarding the character of the offender, we do not agree with Sauer's assertion that the absence of a prior dealing conviction necessitates the imposition of the advisory sentence. Sauer's criminal history is extensive and, contrary to his suggestion, it is not limited to "unrelated, non-violent misdemeanors." Appellant's Br. p. 16. In sentencing Sauer the trial court stated:

> Mr. Sauers you have one of the worst criminal histories that I've seen in a long time. As reflected in the PSI, as a juvenile you had eleven (11) adjudications; six (6) of which would have been felony offense had they been committed as an adult.
>
> As an adult, prior to these offenses you had eleven (11) prior felony convictions, uh, twenty-seven (27) arrests. Um, many of the felony convictions [sic] were dismissed as part of plea agreements in connection with the eleven (11) convictions that you did have.
>
> From the sparse information I received in the PSI Report the Court cannot find one (1) mitigating circumstance to be applied. Your actions leading to these convictions and uh, many of your other convictions have simply destroyed or severely damaged the lives of many individuals. Probation is not even a consideration.

Tr. pp. 671-72.

Sauer's criminal history includes convictions, some on multiple occasions, for dealing in a controlled substance, possession of marijuana, battery, resisting law enforcement, theft, pointing a firearm, criminal recklessness, possession of narcotics, possession of methamphetamine, operating while intoxicated, maintaining an illegal drug lab, and driving while suspended. Sauer certainly has not led a law-abiding life.

Further, Sauer's attorney's bare assertion at the sentencing hearing that Sauer had a sixteen-year-old daughter whom he supported does not mitigate Sauer's extensive criminal history or the nature of the offenses. Based on the nature of the offense and the character of the offender, we conclude that Sauer's fifty-five-year sentence is appropriate.

Conclusion

There is sufficient evidence to support Sauer's convictions. Under these facts, the illegal drug lab conviction is not a lesser included offense of the dealing conviction. The issue of the delay in the sentencing hearing is waived. Finally, Sauer has not shown that his sentence is inappropriate. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.